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No. 07-1422

In the Supreme Court of the United States

MICHAEL ANTHONY HURLEY AND
JO ANNA PICCIONE HURLEY, PETITIONERS

v.

BUREAU OF IMMIGRATION & CUSTOMS
ENFORCEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that there was no federal court jurisdiction under 8 U.S.C. 1252 to hear a challenge to a removal order against an alien admitted under the Visa Waiver Program, filed nearly three years after that order became final.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not published in the *Federal Reporter* but is reprinted at 257 Fed. Appx. 726. The decision of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2007. A petition for rehearing was denied on February 13, 2008 (Pet. App. C). A petition for a writ of certiorari was filed on May 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 1187 of Title 8 authorizes establishment of the Visa Waiver Program (VWP). Under the VWP, alien visitors may enter the United States from designated countries for a period not to exceed 90 days without having first obtained a nonimmigrant visa. 8 U.S.C. 1187(a)(1). The statute also provides:

> An alien may not be provided a waiver under the program unless the alien has waived any right—
>
> (1) to review or appeal under this chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or
>
> (2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

8 U.S.C. 1187(b).

Accordingly, the VWP is predicated on a type of *quid pro quo*: the Attorney General—now the Secretary of Homeland Secretary—agrees to waive an alien's inadmissability for lack of a visa if, and only if, that alien agrees before he is admitted to waive the right to challenge any later finding of removability. VWP Form I-94W includes a certification in which the alien must acknowledge that he understands and agrees to the conditions of admission. See, *e.g.*, *Hauda* v. *Clark*, 401 F.3d 1129, 1131-1133 (9th Cir. 2005).

b. Section 1255(a) of Title 8 authorizes the Attorney General or the Secretary of Homeland Secretary to adjust the status of an alien admitted to the United States to that of an alien lawfully admitted for permanent residence. Such adjustments of status are a discretionary form of relief, and appeals of denials are not permitted.

See, *e.g.*, *Scheerer* v. *United States Attorney Gen.*, 513 F.3d 1244, 1253 (11th Cir. 2008), petition for cert. pending, No. 07-1555 (filed June 13, 2008); 8 C.F.R. 245.2(a)(5)(ii) ("No appeal lies from the denial of an application [for adjustment of status] by the director.").

2. Petitioner Michael Hurley is a native of India and a citizen of the United Kingdom, and petitioner Jo Anna Hurley, his wife, is a citizen of the United States. Michael Hurley applied for admission to the United States under the VWP as a nonimmigrant visitor upon his arrival in Dallas on April 26, 2003. Pet. App. G. He was admitted for a 90-day period not to extend beyond July 25, 2003. *Ibid.*

On July 24, 2003, the day before his authorized stay was to expire, he filed an application to adjust his status. Pet. App. E. On May 11, 2004, Citizenship & Immigration Services (CIS) in the Department of Homeland Security (DHS) denied his application. *Ibid.*[1] CIS indicated that Michael Hurley was inadmissible because he had been convicted and imprisoned in Italy for possessing 69 grams of hashish and that, when asked under oath during an interview whether he had ever committed a drug-related offense (either in the United States or elsewhere), he had answered "no," as he had on his application to adjust status. *Ibid.*

On May 17, 2004, Immigration and Customs Enforcement (ICE) in DHS issued Michael Hurley a Notice of Intent to Deport for violating the terms of his admission under the VWP, specifically for failing to depart the United States on or before July 25, 2003. Pet. App. F.

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[1] On March 1, 2003, the Immigration and Naturalization Service (INS) ceased to exist as an independent agency within the Department of Justice, and its functions were transferred to the newly formed DHS. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

On the same day, ICE issued a removal order. Pet. App. G. Michael Hurley was deemed removable under 8 U.S.C. 1182(a)(2)(A)(i)(II), as an alien who has been convicted of a controlled-substance offense, and under 8 U.S.C. 1227(a)(1)(B), as a nonimmigrant who remained in the United States for a time longer than permitted. Pet. App. G. Petitioners did not seek any review of the removal order at that time.

On June 22, 2004, Michael Hurley was granted an initial stay of removal by the Field Director of ICE through January 21, 2005. Pet. App. H. Based upon the certification of Louisiana Senator Mary Landrieu that she had introduced a private bill in the Senate seeking relief on Michael Hurley's behalf, he was granted an additional stay of removal throughout the deliberation of the bill. *Ibid.* But the Senate did not enact the bill. Following a series of further stays of removal, Michael Hurley was ordered to report to a detention center on April 6, 2007.

3. On April 3, 2007, petitioners filed a complaint in the United States District Court for the Western District of Louisiana, seeking to enjoin defendants ICE and CIS from removing Michael Hurley to his home country. See Pet. App. B.

On April 4, 2007, the district court ruled that it lacked subject matter jurisdiction and dismissed the case. Pet. App. B. The court stated that, pursuant to 8 U.S.C. 1252(f)(2) and (g), it lacked jurisdiction to prevent the execution of the removal order. *Id.* at B3. The court also advised that "any relief [petitioners] may be entitled to, which based on the allegations contained in their complaint facially appear to have no basis in law or fact, must be directed to the United States Court of Appeals for the Fifth Circuit pursuant to 8 U.S.C. Sec.

1252, as amended by the Real ID Act of 2005, and then, only if all of plaintiff Michael A. Hurley's administrative remedies have been exhausted." *Id.* at B4.

On April 5, 2007, petitioners filed a document entitled Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction and Petition for Review and Other Relief, which the court of appeals liberally construed as a notice of appeal. On April 10, the court of appeals denied petitioners' motion for a stay of removal. Pet. App. D. On April 16, while the case was pending before the court of appeals, Michael Hurley was removed to England. Pet. 21.

On December 6, 2007, the court of appeals, in an unpublished *per curiam* opinion, dismissed the case for lack of jurisdiction. Pet. App. A. The court initially declined to consider the filing as a petition for review because, if it did so, it would be required to dismiss the case "because, as a petition for review, it is untimely filed on its face." *Id.* at A3. Even construing it as a notice of appeal, however, the court of appeals held that the case must be dismissed for lack of jurisdiction as a result of untimeliness. *Id.* at A4.

ARGUMENT

Petitioners seek review of the dismissal of a suit seeking to undo a nearly three-year-old removal order. Petitioners do not appear to dispute that the courts below lacked jurisdiction under 8 U.S.C. 1252, but rather raise numerous constitutional claims (including one to Section 1252(b)(1)'s 30-day time limit for filing a petition for review) and other arguments pertaining to the underlying determination of removability. The decisions below are correct, do not run afoul of the Constitution, and do not conflict with any decision of the courts of ap-

peals or of this Court. Further review is thus not warranted.

1. The decisions below reached the correct result, as the federal courts lack jurisdiction over petitioners' belated challenge to the removal order. Michael Hurley was ordered removed on May 17, 2004. Petitioners did not seek review of that order (whether before the BIA, the district court, or the court of appeals) until they filed their complaint in district court on April 3, 2007, followed by a similar filing in the court of appeals immediately after the first complaint was dismissed. Even assuming that Michael Hurley were entitled to any review at all—despite the broad VWP waiver of review applicable here pursuant to 8 U.S.C. 1187(b) (see pp. 2-3, *supra*)—petitioners never exhausted administrative remedies, in contravention of 8 U.S.C. 1252(d), and missed the 30-day deadline for filing a petition for review in the court of appeals, in contravention of 8 U.S.C. 1252(b)(1). Filing a petition under Section 1252 was the exclusive means of obtaining federal court review of the removal order. See 8 U.S.C. 1252(a)(5) and (g). Accordingly, the district court and court of appeals correctly dismissed the complaint for lack of jurisdiction.[2]

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[2] The court of appeals could have treated petitioners' second filing in one of two ways: (1) as an untimely petition for review, in which case it clearly would have been subject to dismissal for lack of jurisdiction under 8 U.S.C. 1252(b)(1), or (2) as a timely appeal of the district court's decision, in which case the district court's dismissal of the case for lack of jurisdiction clearly would be affirmed. Although the court of appeals initially indicated it would choose the latter path, its final disposition (dismissal for lack of jurisdiction due to untimeliness) suggests that it ultimately might have relied on the former path as well. Compare Pet. App. A3 with *id.* at A1. Either way, the result is the same: the federal courts lack jurisdiction over petitioners' belated challenge.

2. Petitioners' numerous and novel constitutional claims, spanning from due process to the contracts clause, are largely directed to the merits of the underlying determination of removability. Absent jurisdiction (the lack of which is established above), however, those claims are beside the point. In any event, they lack merit, and none of them implicates any conflict among the courts of appeals.

One of petitioners' constitutional claims, however, does appear directed to the jurisdictional issue: that the 30-day time limit set forth in Section 1252(b)(1) violates petitioners' due process rights. Pet. 31-34. Even assuming Michael Hurley's removal order was eligible for judicial review in the first place (which, as discussed above, is doubtful because he entered under the VWP), the 30-day time limit for seeking such review does not deprive petitioners of due process. That they were not aware of the time limit or alerted to it by their attorneys (Pet. 32) does not excuse their failure to comply with it, let alone give rise to a due process violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

GREGORY G. KATSAS
Assistant Attorney General

DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

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